

# STATE ORGAN-DONATION INCENTIVES UNDER THE NATIONAL ORGAN TRANSPLANT ACT

SALLY SATEL\*

JOSHUA C. MORRISON\*\*

RICK K. JONES\*\*\*

## I

### INTRODUCTION

Our current transplant regime is a qualified failure. Transplant operations have been basically flat for the last eight years. In 2013, over 4300 people died while waiting and about 3000 were permanently removed from the queue because they developed a medical condition that precluded transplant.<sup>1</sup>

Twenty-seven years ago, the average wait for a deceased-donor kidney in the United States was about one year; now, the average wait is approaching five years.<sup>2</sup> In many parts of the country it has reached a ten-year wait from listing to transplant—if one can survive that long.<sup>3</sup>

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\* Lecturer at Yale University School of Medicine and scholar at the American Enterprise Institute. The views and opinions expressed in this article are solely those of the authors and not of the Pennsylvania Legislative Budget & Finance Committee. The authors extend deep appreciation to Alan Viard for his most insightful comments, Mark Perry for graphics, and to Rita Gilles for her research and editorial assistance.

\*\* Co-Executive Director of WaitList Zero, a nonprofit devoted to increasing living kidney donation.

\*\*\* Counsel with the Pennsylvania Legislative Budget & Finance Committee.

1. Health Res. & Servs. Admin., *National Data Reports January 1995–May 31, 2014*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/latestData/step2.asp> (last visited Sep. 7, 2014) (When accessing this source, in “Choose Category,” input “Waiting List Removals,” and in “Choose Organ,” input “Kidney.” In “Step 2,” follow “Removal Reasons by Year.”).

2. Fred P. Sanfilippo et al., *Factors Affecting the Waiting Time of Cadaveric Kidney Transplant Candidates in the United States*, 267 JAMA 247, 249 (citing a median of 11.3 months), available at <http://jama.jamanetwork.com/article.aspx?articleid=394408>; see also Jackie Carr, *New Clinic Offers Access to Shorter Wait List for Kidney Transplantation*, UC SAN DIEGO NEWS CTR (Feb. 18, 2010), <http://ucsdnews.ucsd.edu/archive/newsrel/health/02-18ShorterWaitList.asp> (citing a five to seven-year wait in 2010).

3. See Benjamin Hippen, *Preventive Measures May Not Reduce the Demand for Kidney Transplantation. There Is Reason to Suppose This Is Not the Case*, 70 KIDNEY INT’L 606 (2006); Robert M. Merion et al., *Deceased-Donor Characteristics and the Survival Benefit of Kidney Transplantation*, 294 JAMA 2726 (2005); Akinlolu O. Ojo et al., *Survival in Recipients of Marginal Cadaveric Donor Kidneys Compared with Other Recipients and Wait-Listed Transplant Candidates*, 12 J. AM. SOC’Y

Maximizing deceased donation, although a worthy effort, is not a definitive solution to the organ shortage. Of the roughly two million Americans who die annually, only 10,500 to 13,800, representing less than one percent of all deaths each year, possess organs healthy enough for transplanting.<sup>4</sup> Moreover, when unaware of the preference of their loved ones, only about half of families give permission for the organs to be retrieved at death.<sup>5</sup> The number of deceased donors in 2012 as reported by the United Network for Organ Sharing (UNOS)—about 7400—is consistent with these realities.<sup>6</sup> The built-in constraint on the number of potentially transplantable posthumous kidneys also underscores why a “presumed-consent” law<sup>7</sup> is unlikely to yield the huge windfall of transplantable kidneys that would be needed to solve our organ shortage.<sup>8</sup> More is needed.

In order to address the organ shortage, its cause must first be determined. The woeful inadequacy of organ-procurement policy lies in its ideological bedrock: the notion that altruism—that is, sacrifice without expectation of material reciprocation or enrichment—is the only legitimate motive for donating an organ.

Bearing this cause in mind, solving the organ shortage becomes an achievable task. The remedy to the shortage lies in modifying the de facto enrichment ban.<sup>9</sup> This is not as difficult as it may at first seem, because the de facto ban, even if purportedly justified by altruism, is not as cemented in actual law as its proponents claim. To be sure, the law as it is currently understood does ban donor enrichment.<sup>10</sup> But, as explained below, full prohibition is unsupported by the relevant statute, which, accurately understood, should

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NEPHROLOGY 589 (2001).

4. Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENGLAND J. MED. 667, 667 (2003); Sherry L. Murphy et al., *Deaths: Final Data for 2010*, NAT'L VITAL STAT. REP., May 8, 2013, at 1, 5.

5. Sheehy, *supra* note 4, at 667.

6. COMM. ON INCREASING RATES OF ORGAN DONATION, NAT'L RESEARCH COUNCIL, ORGAN DONATION: OPPORTUNITIES FOR ACTION 100 (James F. Childress & Catharyn T. Liverman eds. 2006); see Health Res. & Servs. Admin., *Organ Datasource*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/organDatasource/> (last visited Sep. 7, 2014).

7. A presumed-consent law is a law that presumes all individuals to be organ donors at death unless they explicitly indicate otherwise.

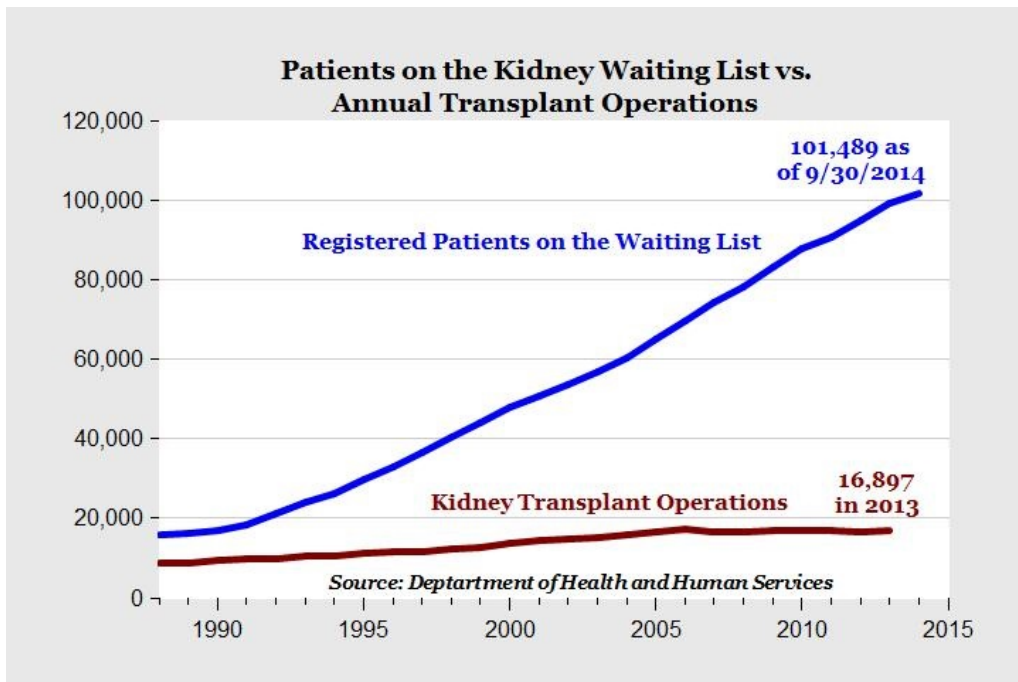
8. Kieran Healy, *Do Presumed Consent Laws Raise Organ Procurement Rates?*, 55 DEPAUL L. REV. 1017 (2006). Furthermore, although European countries with presumed-consent (also known as opt-out) policies did enjoy a boost in cadaveric-kidney supply after the policy was implemented, it is unclear whether their success was due to the new policies itself or to the simultaneous investment made in procurement infrastructure. To be sure, a presumed-consent strategy has merit. Another plan known as “forward” payment (wherein individuals arrange to have their organs taken at death in exchange for a payment to their estate or family) is also worth considering, but is beyond the scope of this article.

9. See generally WHEN ALTRUISM ISN'T ENOUGH: THE CASE FOR COMPENSATING KIDNEY DONORS (Sally Satel ed., 2008).

10. Jed Adam Gross, Note, *E Pluribus Unos: The National Organ Transplant Act and its Postoperative Complications*, 8 YALE J. HEALTH POL'Y L. & ETHICS 145, 179–80 (2008) (quoting S. Res. 251, 98th Cong. (1983)).

prohibit only bargained-for commercial exchanges. The statute should not prevent states from providing reasonable, noncommercial, gratuitous incentives to organ donors.

*Figure: Patients on the Kidney Waiting List vs. Annual Transplant Operations*<sup>11</sup>



Before explaining why donor enrichment is not fully prohibited by law, a brief reminder of the stakes is appropriate. Consider this scenario: A good-Samaritan donor shows up at his local transplant center offering a kidney to the next person on the center’s list. He passes all the screening tests, signs consent forms, and undergoes surgery. His act allows a debilitated person to resume his or her full, active role as a spouse, parent, and worker. The donor is nothing less than someone’s savior. Under current law, however, if he accepts some kind of tangible benefit for his act, he is considered a criminal. Even if the largesse he receives—perhaps a contribution to his retirement account, a generous tax credit, or in-state tuition for his child (or perhaps payments to defray burial costs if he donated at death)—does not come from the patient whose life he

11. See Health Res. & Servs. Admin., *Current Waiting List, Candidates, Overall by Organ*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/latestData/step2.asp> (in “Choose Category” input “Waiting List,” select “Candidates”; in “Step 2” follow “Overall by Organ.”) (last visited Nov. 18, 2008); Health Res. & Servs. Admin., *U.S. Transplants Performed: Jan. 1, 1988–Dec. 31, 2013, Kidney, All Donor Types*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, <http://optn.transplant.hrsa.gov/latestData/step2.asp> (in “Choose Category” input “Transplant,” in “Choose Organ” input “Kidney.” In “Step 2” follow “Transplants by Donor Type”).

saved, but from a federal or state government, the standard interpretation of the National Organ Transplant Act (NOTA) is that the donor has violated the law. Likewise, no matter that a noncash reward would not appeal to a person in desperate need of financial help who would want quick money rather than a delayed in-kind reward. Never mind that a months-long waiting period would dampen impulsivity, allowing ample time for any potential donor to undergo detailed education about the procedure, in addition to careful medical and psychological screening. Not to mention that participants in a donor-enrichment program would receive quality follow-up care, a form of protection that the current system does not guarantee to donors. And forget that the general climate of opinion regarding donor compensation as revealed in polls is generally positive.<sup>12</sup> Regardless of all these factors, the prevailing impression of section 301 of NOTA is that it prohibits any and all enrichment, even if the enrichment is offered as a gratuity by the state rather than by the patient.

In this article, we conclude that section 301's proscription against "valuable consideration" should not prohibit state-government programs providing reasonable incentives for organ donation. The prohibition ought only apply to activity that is clearly and definitely commercial. All else, ideally, should be allowed.

We recognize, nevertheless, that there would likely be limits to the amount and structure of a state benefit for organ donation beyond which a reasonable person would believe an organ to be given in exchange for the payment of the state benefit—in other words, that a business-type inducement occurred, akin to

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12. Polls and surveys reveal four trends: (1) among the general public, the majority either endorses in-kind donor rewards or is neutral, (2) the number of people who report that incentives make donation appear more attractive to them outnumber those who say that an incentive option would make them less likely to donate, (3) youthful cohorts are more receptive to incentives than their older counterparts, and (4) the public is more amenable to the idea than are medical professionals. See Satel, *supra* note 9, at 154–57; see also REASON-RUPE, PUBLIC OPINION SURVEY: MARCH 2012 TOPLINE RESULTS (2012), available at <http://reason.com/assets/db/13327728509738.pdf>; Karise Carrillo, *Examining Attitudes on Organ Donation for Transplant: Amenability to Financial Incentives and Donor Benefits*, 3 MCNAIR SCHOLARS RES. J. 1 (2010); Scott D. Halpern et al., *Regulated Payments for Living Kidney Donation: An Empirical Assessment of the Ethical Concerns*, 152 ANNALS INTERNAL MED. 358 (2010); Harry L. Humphries et al., *Framing the Gift of Life: An Empirical Examination of Altruism, Social Distance and Material Incentives in Non-Directed Kidney Donor Motivation*, 31 J. NEPHROLOGY SOC. WORK 20 (2009); J.D. Jasper et al., *Altruism, Incentives and Organ Donation: Attitudes of the Transplant Community* 42 MED. CARE 378 (2004); S. Leider & A.E. Roth, *Kidneys for Sale: Who Disapproves, and Why*, 10 AM. J. TRANSPLANTATION 1221 (2010); Ken Resnicow et al., *Development of a Scale to Measure African American Attitudes toward Organ Donation*, 17 J. HEALTH & PSYCHOL. 389 (2012); J.R. Rodrigue et al., *Stimulus for Organ Donation: A Survey of the American Society of Transplant Surgeons Membership*, 9 AM. J. TRANSPLANTATION 2172 (2009); Alison J. Wellington & Edward A. Sayre, *An Evaluation of Financial Incentive Policies for Organ Donations in the United States*, 29 CONTEMP. ECON. POL'Y 1 (2011); Scott Hensley, *Poll: Americans Show Support For Compensation of Organ Donors*, NPR (May 16, 2012, 3:00 AM), <http://www.npr.org/blogs/health/2012/05/16/152498553/poll-americans-show-support-for-compensation-of-organ-donors>. By 1991, the subject of the organ shortage was sufficiently familiar for a CNN–Time Yankelovich poll to ask people what they would do if they “or a close relative had a fatal disease that could possibly be cured by the transplant.” CNN/Time Yankelovich, “The Ethical Questions of Organ Donation,” survey conducted June 4–5, 1991. Fifty-six percent of respondents say they would “purchase the necessary organ or tissue.” *Id.*

a clear commercial activity. Our purpose is neither to argue for or against the validity of such a limit nor establish its boundary, if it exists. Rather, our purpose is to assert only that a state benefit made within the bounds of reasonableness and given as a gratuity or incentive crafted to underscore a noncommercial, public-policy purpose should not be barred by NOTA. We suggest specific features of a benefit program that should insulate donations from being designated as commercial.

In reaching the conclusion that NOTA should not ban incentives outright (particularly not state incentives), we interpret the actual text of the 1984 NOTA<sup>13</sup> and then consider the Act's legislative history and the policy concerns that motivated it, as well as interpretive canons, federalist principles, and interpretations by other pertinent entities. Our analysis of the legislative history and policies behind NOTA section 301 shows that NOTA's prohibition was meant to protect against monetary commercial exchanges, such as those between patient-buyers, donor-sellers, and profiteering middlemen. Government disbursements that are intended as gratuities or incentives advancing a public-policy purpose fall outside the language and intent of NOTA section 301(a). Moreover, state benefits easily address concerns originally raised during the debate over inserting the section 301(a) ban. State-benefit programs should therefore not be prohibited under NOTA.

We find further support for this less restrictive view of NOTA section 301 in the relevant rules of statutory interpretation and construction, as well as in broad federalist principles, and in interpretations reached by other relevant entities. The rule of lenity and principles of federalism both support the idea that NOTA section 301 should be read narrowly, as allowing (by not prohibiting) state-benefit programs. A broader normative view of federalism should make courts hesitant to preempt state authority in devising public policy-driven efforts to provide benefits to organ donors, where not directly in conflict with federal law. Preemption would intrude on the state's fundamental ability to decide how fiscal burdens and benefits are distributed among its citizens—its treatment of citizens who donate organs and those who do not. Latitude should be granted to state governments in enacting organ donor-benefit programs. Allowing the development of state approaches to organ-donation incentives creates the chance to use varying state legal regimes as laboratories to test change, allowing reform efforts to be tested fairly quickly. Finally, this conclusion is supported by the analysis of the scope of section 301(a) put forth by the U.S. Department of Justice in the context of paired kidney exchange programs.

Of course, whether or not NOTA section 301 has been *properly* interpreted as broadly banning donor enrichment, it undeniably has been read that way, at least by some. Thus, our statutory arguments may be of limited use in solving the actual problem on the ground. This unfortunate reality is made all too clear

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13. 42 U.S.C. §§ 273–274e (2006 & Supp. IV 2011).

by an examination of Pennsylvania's funeral-voucher subsidy, whereby donors would be enriched via a burial subsidy that would be paid by the state directly to a funeral home. Even though NOTA's applicability to the law was at best dubious, the law nonetheless failed—even after passage—due to legal concerns about NOTA. This bit of history confirms that, whatever the proper interpretation of NOTA section 301 actually is at present, the best course forward requires clarification of the law, either through obtaining an official opinion from the U. S. Department of Justice definitively interpreting the law in the context of state incentive programs or via amendment of the law.

We argue for clarification of the law through an opinion by the U.S. Department of Justice [DOJ] Office of Legal Counsel [OLC], whose responsibility it is to provide written opinions and advice to the various agencies of the federal executive branch. Definitive interpretation of the federal NOTA statutory restriction on transferring human organs for valuable consideration would come within the OLC's jurisdiction upon request by an appropriate federal agency, as was done with the issue of paired kidney exchanges. A similar request of the DOJ's OLC should be made regarding state incentive programs.

Moreover, clarification via amendment would be beneficial in clarifying the scope of NOTA section 301. Congress should amend NOTA to explicitly exempt state-benefit programs. Precedent for congressional action exists in the form of the Charlie W. Norwood Paired Donation Act of 2007 (Norwood Act),<sup>14</sup> which amended NOTA to clarify that it did not prohibit organ exchanges. NOTA clarification through either a DOJ formal opinion or legislative amendment is undoubtedly the best way forward. It might even be the only way forward if we want to solve our organ shortage.

## II

### “VALUABLE CONSIDERATION” REFERS TO COMMERCIAL ENDEAVORS

In our tripartite system, the legislature is the primary lawmaking branch of government, exercising its will within the limits of its constitutional authority and through the medium of statutory law.<sup>15</sup> Courts, in contrast, adjudicate controversies by interpreting and applying the law.<sup>16</sup> The objective in interpreting any statute is to effectuate statutory purpose—to discover and give meaning to what the legislature intended through the language it used in the statute.<sup>17</sup> Such interpretation always begins with the text of the law being

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14. Pub. L. No. 110-144, 121 Stat. 1813 (2007) (codified at 42 U.S.C. §§ 273b, 274e (2006 & Supp. IV 2011)).

15. See *Separation of Power—An Overview*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/legislatures/separation-of-powers-an-overview.aspx> (last visited Sep. 7, 2014).

16. See *id.*

17. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2008) [hereinafter STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS].

reviewed.<sup>18</sup>

If the language of a statute is clear, there is no need to look to other sources to interpret it.<sup>19</sup> If, however, there is uncertainty in the language, other rules of interpretation and outside sources come into play.<sup>20</sup> Section 301 of NOTA requires such clarifying analysis. As the relevant parts of the section stipulate,

(a) Prohibition. It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. The preceding sentence does not apply with respect to human organ paired donation.

(b) Penalties. Any person who violates subsection (a) of this section shall be fined not more than \$50,000 or imprisoned not more than five years, or both.

(c) Definitions. For purposes of subsection (a) of this section:

(1) The term “human organ” means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.

(2) The term “valuable consideration” does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

(3) The term “interstate commerce” has the meaning prescribed for it by section 321(b) of Title 21.

(4) The term ‘human organ paired donation’ means the donation and receipt of human organs under the following circumstances:

(A) An individual (referred to in this paragraph as the ‘first donor’) desires to make a living donation of a human organ specifically to a particular patient (referred to in this paragraph as the ‘first patient’), but such donor is biologically incompatible as a donor for such patient.

(B) A second individual (referred to in this paragraph as the ‘second donor’) desires to make a living donation of a human organ specifically to a second particular patient (referred to in this paragraph as the ‘second patient’), but such donor is biologically incompatible as a donor for such patient.

(C) Subject to subparagraph (D), the first donor is biologically compatible as a donor of a human organ for the second patient, and the second donor is biologically compatible as a donor of a human organ for the first patient.

(D) If there is any additional donor-patient pair as described in subparagraph (A) or (B), each donor in the group of donor-patient pairs is biologically compatible as a donor of a human organ for a patient in such group.

(E) All donors and patients in the group of donor-patient pairs (whether 2 pairs or more than 2 pairs) enter into a single agreement to donate and receive such human organs, respectively, according to such biological compatibility in the group.

(F) Other than as described in subparagraph (E), no valuable consideration is knowingly acquired, received, or otherwise transferred with respect to the human

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18. *Id.* at 2.

19. *Id.*

20. *Id.* at 40.

organs referred to in such subparagraph.<sup>21</sup>

The question at hand is: does a state-provided benefit associated with, and made subsequent to, the donation of a human organ constitute a transfer of the organ for “valuable consideration” in violation of NOTA section 301(a)?<sup>22</sup>

If a word or phrase is specifically defined in statute, then that definition controls.<sup>23</sup> Although NOTA section 301(a) proscribes the transfer of human organs for “valuable consideration,” it does not explicitly define that term. While section 301 includes the term “valuable consideration” in its definitions section, it sets forth only select examples of what the term does not include: “reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.”<sup>24</sup>

NOTA’s text thus gives guidance in the negative but does not describe the nature and character of “valuable consideration.” However, the text offers absolutely no support for the conclusion that anything not specifically excluded by the express language of NOTA section 301 must be deemed consideration, and therefore prohibited.

If left undefined by the statute in which it appears, a word or phrase that has a specific technical meaning elsewhere in the law will be deemed to bring with it that accepted and well-established meaning.<sup>25</sup> The U.S. Supreme Court has said,

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.<sup>26</sup>

This principle sheds considerable light on the meaning of NOTA section 301(a). “Consideration” is a word whose meaning is firmly rooted in contract law: It refers to a bargained-for exchange between parties that serves as the

21. 42 U.S.C. § 274e (2006 & Supp. IV 2011). Sean Arthurs cites recent Supreme Court rulings that might put intrastate markets beyond the scope of federal legislation. *See* Sean Arthurs, *No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of our National Organ Donation Regime*, 73 U. CIN. L. R. 1101 (2005).

22. *See generally* Rick K. Jones, *The Gift of Life and “Diseases of Language”: Recovering a Lost Distinction in Effectuating the Purpose of the National Organ Transplant Act’s Prohibition on the Transfer of Human Organs for Valuable Consideration*, 80 TEMP. L. REV. 1067 (2007) (explaining what constitutes valuable consideration under NOTA).

23. STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 17, at 5.

24. 42 U.S.C. § 274e(c)(2) (2006 & Supp. IV 2011).

25. *See* STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 17, at 6 n.23. (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991) (“Where a common law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’”)).

26. *Morissette v. United States*, 342 U.S. 246, 263 (1952).



basis for an enforceable contract.<sup>27</sup> It is a term of commerce and signifies an exchange that is mutually induced.<sup>28</sup> Consideration is not a component of gratuitous transfers, in which one party gives something of value independent of receiving anything in return.<sup>29</sup> Given this well-established meaning, it is reasonable to conclude that the idea of “valuable consideration” in NOTA was meant to apply to bargained-for, contract-type commercial arrangements and not to state-benefit programs, which are designed to provide a gratuity or advance other noncommercial, public-policy objectives. This conclusion about the meaning of valuable consideration is further supported by the legislative history of NOTA, its background purposes, application of canons of statutory interpretation and construction, principles of federalism, and de facto enforcement of NOTA section 301. These supporting factors are examined in turn in the subparts that follow.

#### A. The Legislative History of NOTA Section 301(a) Is Buying and Selling Focused

The specific legislative history behind the insertion of section 301’s prohibition can be used to shed light on congressional intent.<sup>30</sup> The legislative history of NOTA section 301 supports the notion that it was meant to apply only to bargained-for, contract-type commercial arrangements. The prohibition was a straightforward legislative response to a plan by an infamous physician—H. Barry Jacobs—to buy organs from individuals flown in from Third World countries and sell them to patients in need. Dr. Jacobs charged the patients, or Medicare, a \$2,000 to \$5,000 fee for his service.<sup>31</sup> The legislative history, though replete with denunciations of commercial transactions of this kind, is largely silent on other kinds of compensatory transactions.<sup>32</sup>

The first evidence that NOTA was a response to Dr. Jacobs’s plan lies in the legislation’s early drafts. Those drafts were largely silent on payment for organs and instead concentrated on the creation of a nationwide procurement and distribution system for organs. And, at one of the early NOTA hearings in the House, Al Gore, then the Tennessee congressman spearheading the legislation, spoke approvingly of “the provision of incentives, such as a [presumably third-party] voucher system or a tax credit to a donor’s estate” if “efforts to improve voluntary donation are unsuccessful.”<sup>33</sup>

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27. See RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1979).

28. See *id.* § 71(2) (explaining requirement of mutual promises).

29. *Id.* § 71 cmt. b.

30. See STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 17, at 39–44.

31. *A Bill to Amend the Public Health Service Act to Authorize Financial Assistance for Organ Procurement Organizations and For Other Purposes: Hearing on H.R. 4080 Before the Subcomm. on Health & Env’t of the H. Comm. on Energy & Commerce*, 98th Cong. 10 (1983) [hereinafter *Hearing on H.R. 4080 Before the Subcomm. on Health & Env’t*].

32. *Id.*

33. *Id.* at 10.

But then, in the fall of 1983, came a *Washington Post* story about H. Barry Jacobs, whose medical license had been revoked five years earlier on a conviction for Medicare fraud. The story discussed Jacobs' plans to establish an organ brokerage called the International Kidney Exchange (IKE). Jacobs would recruit healthy individuals from poor countries and fly them to the United States where he would pay them for one of their kidneys. The individual needing a transplant would pay for the cost of the kidney plus \$2000 to \$5000 for Jacobs' service to "escape the tyranny of dialysis," as the *New York Times* put it.<sup>34</sup>

In November 1983, Representative Al Gore's Subcommittee on Investigations and Oversight of the House Committee on Science and Technology invited Jacobs to testify at a hearing entitled *Procurement and Allocation of Human Organs for Transplantation*. His testimony was not well-received. Jacobs' pugnacious manner and his frank acknowledgement of the money-making potential of IKE could not have helped his cause. Jacobs' "business plan" became the lightning rod for a general outcry against the idea of paying for organs.<sup>35</sup> Section 301, a provision prohibiting payment for organs, was soon inserted into the draft bill.<sup>36</sup>

Over the course of numerous NOTA hearings and congressional reports, a set of concerns driving the prohibition emerged, all of them relating to commercial payments by the recipient to the donor that might or might not be mediated by a broker—but none of them by their terms extending to noncommercial (though perhaps still enrichment-bearing) transactions. The Senate Committee on Labor and Human Resources stated in its report that the proposed legislation "[p]rohibits the interstate *buying and selling* of human organs for transplantation,"<sup>37</sup> and that "the prohibition on the buying and selling of human organs is directed at preventing the for-profit *marketing* of kidneys and other organs,"<sup>38</sup> and, finally, that "[i]t is the sense of the Committee that individuals or organizations should not *profit* by the sale of human organs for transplantation."<sup>39</sup> The House conference report reiterated that section 301 was directed toward monetary exchanges: "This title intends to make the buying and selling of human organs unlawful . . . ."<sup>40</sup> The key terms, "buying," "selling," "marketing," and "profit," are all terms relating to commercial business transactions.

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34. Nicholas Wade, *The Editorial Notebook; The Crisis in Human Spare Parts*, N.Y. TIMES, Oct. 4, 1983, at A26; see also Susan Hankin Denise, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015 (1985).

35. Keith Mueller, *The National Organ Transplant Act of 1984: Congressional Response to Changing Biotechnology*, 8 POL'Y STUD. REV. 346, 350 (1989); Victor Cohn, *New Federal Help for Transplants Pressed by Gore*, WASH. POST, Oct. 6, 1983, at A17 (describing how Gore was moved to ban commerce of organs as a "response" to Barry Jacobs' Virginia plan for IKE).

36. Cohn, *supra* note 35.

37. S. REP. NO. 98-382, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976 (emphasis added).

38. *Id.* at 2, 4, *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976, 3978 (emphasis added).

39. *Id.* at 16-17, *reprinted in* 1984 U.S.C.C.A.N. 3982 (emphasis added).

40. H.R. REP. NO. 98-1127, at 16 (1984) (Conf. Rep.), *reprinted in* 1984 U.S.C.C.A.N. 3989, 3992.

Members and witnesses also expressed concern that a payment regime would exacerbate economic inequalities because only wealthy patients would be able to afford organs and, to make matters worse, they (and perhaps greedy brokers as well) would be benefitting at the expense of the poor, who would serve as donors.<sup>41</sup> These concerns, again, most clearly applied to commercial transactions for organs. Representative Henry Waxman of the House Ways and Means Committee invoked the image of a degrading, heartless marketplace, saying, “Human organs should not be treated like fenders in a junkyard.”<sup>42</sup> The late Senator Paul Tsongas introduced a Senate resolution entitled *A Resolution to Condemn the Sale for Profit of Human Organs for Transplantation*.<sup>43</sup> His accompanying statement pressed the need for NOTA section 301 as a corrective to monetary exchange that was already taking place sporadically: Representative Tsongas worried that “the . . . pressures caused by a lack of national policy have encouraged the practices of the sale of human organs for profit.”<sup>44</sup> Some commentators said that introducing payment into the organ procurement apparatus could undermine the newly formed altruistic system before its full potential was realized.<sup>45</sup>

The legislative history therefore demonstrates that the insertion of section 301(a), the ban against the transfer of human organs for valuable consideration, was a direct response to a specific plan for the buying and selling of organs. The purpose was to repudiate the kind of commercial transaction reflected in the Jacobs scenario. It was not to broadly prohibit all transactional organ exchanges.

#### B. The Policy Rationale of a NOTA Section 301 Can Be Satisfied Without Banning Noncommercial State-Benefit Programs

When passed, NOTA section 301 was intended to assuage critics who worried that an organ market would (1) necessarily involve class disparity in the distribution of transplants, (2) stifle a system of altruism before it could take root, (3) encourage commodification of donors and profiteering by unscrupulous middlemen, (4) promote crowding out of nonmonetary reasons to

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41. Margaret Engel, *Va. Doctor Plans Company to Arrange Sale of Human Kidneys*, WASH. POST, Sept. 19, 1983, at A9; see *Procurement and Allocation of Human Organs for Transplantation: Hearing on H.R. 4080 Before the Subcomm. on Investigations & Oversight of the H. Comm. on Sci. & Tech.*, 98th Cong. 377 (1983) [hereinafter *Procurement and Allocation of Human Organs for Transplantation*] (statement by physician about inadequate follow-up healthcare); see also *National Organ Transplant Act: Hearing on H.R. 4080 Before the Subcomm. on Health & the Env't of the H. Comm. on Energy & Commerce*, 98th Cong. 257 (1983) [hereinafter *Hearing on H.R. 4080 Before the Subcomm. on Health & the Env't*] (stating that only the wealthy would be able to afford transplants); *id.* at 282 (worrying that the wealthy will benefit at the expense of the poor).

42. *National Organ Transplant Act: Hearing on H.R. 4080 Before the Subcomm. on Health of the H. Comm. on Ways and Means*, 98th Cong. 26 (1984) [hereinafter *Hearing on H.R. 4080 Before the Subcomm. on Health*].

43. S. RES. 251, 98th Cong. (1983).

44. *Id.*

45. *Hearing on H.R. 4080 Before the Subcomm. on Health & Env't, supra* note 31, at 234, 277.

donate, (5) encourage donors to lie about their medical histories, and (6) cause the costs of transplantation to become unnecessarily high. All of these concerns can be fully addressed without interpreting NOTA section 301 to prohibit state incentive programs.

First, critics of Jacobs' plan cited the risk of inflaming economic-class disparity.<sup>46</sup> In a traditional free market, the wealthy can obtain items and the poor cannot. But in virtually all state proposals for donor compensation, it is not the sick person who reaches into his own pocket to reward the donor. A governmental entity provides the reward. Thus, no matter how generous or modest a patient's income, anyone in need of a kidney would benefit. And, in keeping with the current system for distribution of organs from the newly deceased, the newly offered kidney would go to the next patient in line. As for the financial status of donors, as opposed to recipients, some express worry that the promise of a reward will exploit poor donors who saw it as an offer they couldn't refuse. The obvious remedy is to establish a months-long screening process, to allay impulsivity, and to reward donors in the form of a noncash reward which will not appeal to those in desperate need of immediate financial help. An additional option is to limit participation to would-be donors whose incomes are high enough so that they pay taxes (and hence are eligible for a nonrefundable tax credit) or to those who make a certain threshold income. The drawback to such an approach, however, is that it would prevent some very low-income individuals from participating in a program that they might deem beneficial. But in any event, distributive concerns can be addressed within the framework of state-benefit programs—such concerns do not require banning state programs altogether.

A second objection to enriching donors that was expressed at the time was that a national system of organ procurement and allocation was not yet up and running. But what would happen if the "altruistic" system were inadequate? Notably, Al Gore offered a back-up plan. He spoke of using "a voucher system or a tax credit to a donor's estate" if "efforts to improve voluntary donation are unsuccessful."<sup>47</sup> Almost three decades after the passage of NOTA, it is clear that voluntary donation has not succeeded in meeting the needs of thousands of patients. Thus, whatever concern might be voiced over the integrity of the altruistic system has been mooted by the inefficacy of that system.

Third, what of respect for donors? Of treating their organs as "like fenders in a junk yard," as Representative Waxman feared? Herding poor people on a plane to travel to a foreign land to undergo a surgical procedure they might not even understand and shipping them back home without follow-up care is not a winning plan.

But again, that scenario is nothing like the one that has been proposed.

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46. Walter Sullivan, *Buying of Kidneys of Poor Attacked*, N.Y. TIMES, September 24, 1983 at 9; *Hearing on H.R. 4080 Before the Subcom. on Health & Env't, supra* note 31, at 329.

47. *Hearing on H.R. 4080 Before the Subcom. on Health & Env't, supra* note 31, at 10.

Dignity is affirmed when we respect the capacity of individuals to make decisions in their own best interest, protect their health, and express gratitude for their sacrifice. Enrichment is not per se inconsistent with this. It is hard to imagine what kind of sacred principle is threatened by rewarding a donor who is willing, protected, and informed, and whose actions avert needless suffering or save a life.

A fourth concern was that providing financial incentives would decrease the willingness of people to voluntarily donate their organs.<sup>48</sup> Such a conclusion was premised on the writing of British social scientist Richard Titmuss.<sup>49</sup> However, a careful reading of Titmuss does not support this point, and subsequent experiments with incentives for blood donation indicate that any crowding out is not universal and that, among groups where it might be an issue, the problem can be averted by turning the reward into a contribution to a charity.<sup>50</sup> So the concern that altruism might run dry is, again, no bar to state-benefit programs.

Fifth, some witnesses to Jacobs' proposed plan worried that financial incentives would create a powerful inducement for potential donors to provide inaccurate medical histories.<sup>51</sup> That concern is largely moot given the modern-day ability to test for HIV, hepatitis C, and other transmissible diseases. Nor is the time pressure in living-organ donation as pressing as for deceased, where there is not sufficient time to interview the donor's family, obtain old medical records, and so on. State-benefit programs can operate without implicating whatever remnant of this concern still exists.

Another fear was that donors with valuable matches would extort large sums of money from vulnerable patients.<sup>52</sup> Again, there is no opportunity for this to occur because a government, not patients themselves, offers the benefits. Any benefits would be fixed and the kidney would go to the next in line, so a donor could not extort money from any particular individual who needed the kidney of a particular biological type. This fear, too, then, does not necessitate a ban of state-benefit programs.

Finally, there was the caveat that financial incentives would add cost to the overall transplantation budget.<sup>53</sup> This is certainly wrong in the case of kidney transplants (and likely erroneous with respect to other organs as well). Multiple economic analyses of kidney transplantation demonstrate impressive savings

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48. See *Hearing on H.R. 4080 Before the Subcomm. on Health, supra* note 42, at 112, 115, 174–75; *Procurement and Allocation of Human Organs for Transplantation, supra* note 31, at 230, 239–40, 243, 248–49, 269–71, 340–41, 354–56, 369–71.

49. RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970).

50. See Lorenz Goette, Alois Stutzer & Beat M. Frey, *Prosocial Motivation and Blood Donations: A Survey of the Empirical Literature*, 37 *TRANSFUSION MED. & HEMOTHERAPY* 149 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2914427/pdf/tmh0037-0149.pdf>.

51. See *Flynn v. Holder*, 684 F.3d 852, 860 n.30 (9th Cir. 2012).

52. *Id.*

53. Edward W. Nelson et al., *Financial Incentives for Organ Donations: A Rep. to the Payment Subcomm. OPTN/UNOS Ethics Comm.* (June 30, 1993), <http://optn.transplant.hrsa.gov/resources/bioethics.asp?index=4> (last visited Mar. 10, 2014).

based on the removal of patients from chronic dialysis, a treatment that is typically paid for by Medicare and Medicaid, not private insurance.<sup>54</sup> In fact, once a patient is off dialysis, the money saved by the Department of Health and Human Services (HHS) could be used to underwrite the cost of the reward. This concern, like all of the others, by no means requires a ban of state programs—in fact, this one counsels *in favor* of state programs.

In sum, all potential risks enumerated above as the rationale for banning incentives can be mitigated by reform models that stipulate a government-regulated, in-kind system of exchange. State-benefit programs can operate without offending the concerns above.

In its opinion regarding medical marijuana, the DOJ considered whether state law stood ““as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.””<sup>55</sup> We can ask the same thing of a state-initiated effort to pass incentive legislation. Put another way, did Congress truly intend for a widow to be fined \$50,000 or imprisoned for five years because she accepted a funeral benefit in return for permitting doctors to transplant the organs of her deceased husband? Did lawmakers believe that felony charges should be brought against a state-based charity that enables a graduate student fund his retirement account subsequent to donating the kidney that saves the life of a young father who was failing on dialysis? In light of its emphases on buying, selling, power imbalances between the wealthy and the poor, and profiting by intermediaries, it is hard to imagine that Congress had the widow, or even the graduate student, in its sights.

### C. Additional Rules of Statutory Interpretation and Construction

Beyond the language, legislative intent, and background purposes of the ban, two other canons of statutory construction affirm the conclusion that NOTA section 301(a) ought to be read narrowly and, as such, apply only to clearly commercial exchanges, not to state incentive programs. First, the rule of lenity requires statutes with penal provisions (like NOTA section 301) be interpreted narrowly so that criminal sanctions are only imposed in the most unambiguous of circumstances. Second, the presumption against preemption holds that when a federal statute can be read not to preempt state laws, a respect for federalist principles necessitates reading the federal rule narrowly.

#### 1. Criminal Penalties and the Rule of Lenity

In accurately interpreting the scope of NOTA’s prohibition, it is significant to note that the prohibition is enforced by a high—and criminal—penalty for

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54. See Arthur J. Matas & Mark Schnitzler, *Payment for Living Donor (vendor) kidneys: A Cost-effectiveness Analysis*, 4 AM. J. TRANSPLANTATION 216-21 (2004).

55. TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 8 (2012), available at [http://assets.opencrs.com/rpts/R42398\\_20120306.pdf](http://assets.opencrs.com/rpts/R42398_20120306.pdf) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992)).

violation: namely, a possible \$50,000 fine, five years imprisonment, or both.<sup>56</sup> The rule of lenity holds that a court interpreting a penal provision in the law should resolve any statutory uncertainty in favor of the defendant by adopting a narrower—meaning more lenient—reading of the scope of the crime.<sup>57</sup> This idea flows from the concern that expansive judicial interpretations of penal provisions would create criminal penalties not originally intended by the legislature.<sup>58</sup> Following the rule of lenity ensures “fair warning [to citizens] by so resolving ambiguity in a criminal statute as to apply to conduct clearly covered.”<sup>59</sup> Because criminal punishment is to be avoided where not clearly imposed, more lenient interpretations are to be favored over other, similarly plausible but harsher, interpretations.<sup>60</sup> Because NOTA’s prohibition against the transfer of human organs for valuable consideration is enforced by criminal penalties, it should be interpreted narrowly by limiting the scope of prohibited activity to clearly and definitively commercial endeavors.

## 2. Presumption Against Preemption

Under our federalist system, valid federal law supersedes inconsistent state law.<sup>61</sup> There is, however, a presumption against preemption.<sup>62</sup> The U.S. Supreme Court has said, “[H]istoric police powers of the States were not to be superseded by [a federal law] unless that was the clear and manifest purpose of Congress.”<sup>63</sup> Whenever there are multiple plausible interpretations of a statute, courts are to choose the interpretation that grants the most leeway to the states, particularly when the law concerns core state-level functions, including public health and the design of the state’s tax and expenditure system.<sup>64</sup>

The reluctance to preempt state authority is at its apogee when a federal law would disrupt implementation of the state government’s own programs (as opposed to merely displacing the state’s authority to regulate private conduct). Therefore, even if “valuable consideration” is generally interpreted to apply to private payments, it should not so easily apply to state-government benefits provided to organ donors.

There is a precedent for this in the antitrust exemption. The Sherman Act states, “Every contract, combination in the form of trust or otherwise, or

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56. 42 U.S.C. § 274e(b) (2006 & Supp. IV 2011).

57. See generally NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59.3, at 126–31.

58. *Id.* at 133.

59. *United States v. Pritchard*, 346 F.3d 469, 474 (2003) (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)).

60. *Id.*

61. See STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 17, at 18–19.

62. *Id.*

63. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (presumption against preemption for police powers), *quoted in* STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, *supra* note 17, at 18.

64. *Id.*

conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>65</sup> State legislative programs to restrain competition could easily be interpreted to fall within this prohibition. Yet the Supreme Court held in *Parker v. Brown* in 1943 that the Sherman Act does not bar such programs.<sup>66</sup> The Court paid no heed to the absence of a specific exemption for state programs. Instead, it emphasized the absence of a specific *inclusion* of state programs and also relied on the premise that a state program is not a “contract,” “combination,” or “conspiracy.” The Court said:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress. The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . There is no suggestion of a purpose to restrain state action in the Act’s legislative history . . . The state in adopting and enforcing the [challenged] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.<sup>67</sup>

The Court subsequently held that anticompetitive conduct by private parties is immune from the Sherman Act if the parties are implementing a policy “clearly articulated and affirmatively expressed” and “actively supervised” by the state government.<sup>68</sup>

Because NOTA section 301 does not mention the proscription of benefits to organ donors made or authorized by state governments, extending by interpretation the application of NOTA’s restriction to such state benefits would too lightly attribute to Congress “an unexpressed purpose to nullify a state’s control over its officers and agents,” exactly what the Court refused to do in *Parker*.<sup>69</sup>

Indeed, the intrusion on state sovereignty would be even greater in the NOTA context than in the Sherman Act context, at least for organ-donation benefits provided directly by the state. In that case, the issue at stake would not be the state’s power to regulate private businesses, which constantly operates under the possibility of federal preemption, but the state’s fundamental power to structure *its own tax and spending programs*—its ability to decide how fiscal burdens and benefits should be distributed among its citizens.<sup>70</sup> Also,

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65. 15 U.S.C. § 1 (2006).

66. *Parker v. Brown*, 317 U. S. 341, 350–52 (1943).

67. *Id.*

68. *California Retail Liquor Dealers Ass’n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *see also* *Patrick v. Burget*, 486 U.S. 94, 99–100 (1988) (supporting the clearly articulated and actively supervised standard); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56–57 (1985) (supporting the same standard).

69. *Parker*, 351 U.S. at 351.

70. The Supreme Court has repeatedly recognized the vital importance of states’ taxing power. *See, e.g.*, *Bode v. Barrett*, 344 U.S. 583, 585 (1953) (describing “the power of a state to tax” as “basic to its sovereignty”); *Tulley et al. v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (recognizing “the imperative need



interpreting the term “valuable consideration” to include state tax incentives or grants is at least as problematic as interpreting “contract,” “conspiracy,” or “combination” to include state programs to restrain competition.

The case for a NOTA exception for state benefits or tax incentives for organ donors is therefore at least as strong as the case for the *Parker* exception to the Sherman Act. The state is not buying organs. Rather, “as sovereign” and through “an act of government,” the state is bestowing its bounty on citizens who have engaged in behavior of which the state approves. *Parker* teaches, therefore, that NOTA’s ban should be interpreted so as to grant the most leeway to the states and should not apply to benefit programs for organ donation made by or through the state. Moreover, such an interpretation is supported by the principles motivating a federalist system (which is discussed in the next section).

Finally, the DOJ’s OLC contemplated the scope of section 301 of NOTA in a 2007 memorandum.<sup>71</sup> Within this memorandum, the meaning of “commercial” is inconsistent with banning in-kind compensation. The DOJ notes that “[t]he legislative history [of NOTA section 301] does not suggest that any Member of Congress understood the bill as addressing non-monetary or otherwise non-commercial transfers.”<sup>72</sup> Even when transfers, such as swaps (exchanges of kidneys between donors and recipients of two unmatched pairs), go beyond gratuitous offers and enter into quid pro quo territory, the spirit of section 301 has been deemed by the DOJ to remain intact. Like kidney swaps, contemporary incentive plans do not entail cash or purchasing in the traditional sense. There is no overt or implied contract between the patient and the donor: Participants can withdraw without penalty.

Nor is there a role for a broker, like Jacobs, to reap profits.<sup>73</sup> Furthermore,

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of a State to administer its own fiscal operations”). Accordingly, the Court has required that Congress speak clearly when it wishes to restrict states’ taxing authority. *See, e.g.*, *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (stating that “principles of federalism” make the Court reluctant to extend “beyond its evident scope” a federal statute that “sets limits upon the taxation authority of state government, an authority we have recognized as central to state sovereignty”). Because no restrictions on state tax incentives fall with the “evident scope” of NOTA, ACF counsels that the statute not be interpreted as imposing any such restriction.

71. *See infra*, part II.E.

72. Memorandum from C. Kevin Marshall, Deputy Assistant Attorney Gen., to Daniel Meron, Gen. Counsel, Dep’t Health & Human Servs., Legality of Alternative Organ Donation Practices Under 42 U.S.C. § 274e, at 4 n.2 (Mar. 28, 2007) [hereinafter Marshall Memorandum], available at <http://www.justice.gov/olc/opiniondocs/organtransplant.pdf>.

73. On a related note, in the context of medical marijuana, a DOJ memorandum clarified the distinction between sick individuals who required marijuana for health reasons and “commercial,” for-profit dispensaries (which are analogous to brokers like Jacobs). Memorandum from James M. Cole, Deputy Attorney G. to U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), available at <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf>. Prosecutorial discretion extended to the patients who purchased medical marijuana; it was the distributors who were targeted for prosecution. *Id.* In the case of incentivized organ donation, absolutely everyone who requires an organ is very sick, if not terminally ill, and no individual profits from organizing the transfer of an organ to the patient.

the donor reward can be framed as compensation for time and inconvenience, not for the organ per se. This is in keeping with the practice surrounding surrogacy: It is not the baby itself that carries monetary value, but the birth mother's sacrifice of time and inconvenience. Moreover, compensation to organ donors could take the form of noncash, in-kind benefits.

#### D. The Case for Federalism in Organ Transplantation

Federalist principles do more than simply support a canon of statutory construction; they also undergird a basic normative preference in our dualist system. Going beyond the canons of construction, federalism-based arguments can be employed to explain why, as a more basic policy matter, NOTA section 301 should be read as banning only commercial exchanges of organs, rather than government-regulated in-kind systems of exchange.

The general merits of federalism have of course been argued at length in the related scholarship and jurisprudence,<sup>74</sup> and there is no need to go any further in defending federalist principles for the purposes of this article. Even without doing so, the benefits of a federalist approach are clear in the organ transplant-policy case for two reasons: First, because organ transplantation presents unique features that make the normative experimentation, core-competency, local-control, and state-diversity arguments for federalism more powerful. Second, because federalism has been the dominant approach in the field of organ-transplant policy for some time now. The current state of affairs proves that, accepting even just the federalist basics, NOTA section 301 should be read as banning only commercial exchanges of organs.

A signal advantage of federalism is its ability to use varying state legal regimes as laboratories to test change.<sup>75</sup> Enacting reforms on the state level creates natural experiments, with reformist states testing an intervention and complacent states taking the position of the control groups. This dynamic gauges both the positive and negative elements of reform. In the transplant case, where positive results (numbers of donors and transplants) are necessarily easy to count, reform efforts can be tested fairly quickly.

Experimentation also links up well to the commodification concerns raised by compensation-based reforms. The commodification label applies to a set of

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74. See, e.g., Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004); Michael C. Dorf, *The Supreme Court 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60–69 (1998) (advocating using federalism as a model for decentralized decisionmaking for judges to use to allow provisional, workable solutions to disputes); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19–22 (2007) (arguing that constructive political debate is created by strong states' rights as it leads to effective and organized interest groups); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) (“[D]ual sovereignty” defines federalism as “a system of independent national and state governments that must be protected from each other.”).

75. See Hills, *supra* note 74.

arguments that are rather diverse,<sup>76</sup> but some potential consequences are testable hypothesis.<sup>77</sup> For example, compensating a kidney donor could cause a donor (and society in general) to devalue the integrity of her body, or bodies in general; it might lead the donor to envision herself as merely a source of monetary value rather than as a valued human being. Will donors who receive some form of compensation experience themselves as devalued? Will states that allow some forms of compensation for transplants find themselves sliding down a slippery slope towards legalizing other potentially corrupting legal practices? Though unlikely, these kinds of corruptions might possibly follow from compensation-based reforms, and society needs to know if any of them do. Even then, states will still have to weigh the frequency with which they occur against happier outcomes and ways to protect against them in the future. On the other hand, many advocates for donor compensation believe the potential for corruption to be illusory; the only thing capable of informing this debate would be future experimentation with different policies.<sup>78</sup>

There is also a question of the relative competence of federal and state actors in deciding transplant policy. Effective interest-group organizing may be more active at the local level. Different states with different demographic profiles<sup>79</sup> may find the prospect of effectuating change more or less difficult. Additionally, the regional organization of deceased-donation policy means that different states will vary in terms of the demand for change. States that are lagging in transplant outcomes may have a stronger demand for reform. Local interest groups in those states might become more active than those in more successful states. Alternately, policy innovators in relatively successful states might have more influence and expertise, allowing them to be more effective in enacting policy. On a federal level, moreover, interest-group politics may be less effective. Given the lack of progress in recent years, it may be the case that current stakeholders have grown complacent and are incentivized to simply perpetuate their own fiefdoms. If reform is itself desirable, the states may be the only game in town. Piloting reform at the state level can help foster a national discussion.

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76. Julie Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 121, 121–24 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).

77. See MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS* (1996); M. SANDEL, *WHAT MONEY CAN'T BUY* 9 (2012); Elizabeth Anderson, *Is Women's Labor a Commodity?*, 19 *PHIL. & PUB. AFF.* 71 (1990).

78. See *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (en banc); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 *HARV. L. REV.* 1813 (2007).

79. Hypertension and diabetes (as well as other causes of kidney disease) are more prevalent among poorer populations. Minorities are typically overrepresented on the waiting list for organs, partly because of increased risk factors and partly because the increased difficulty of biological matching from a smaller population. See Jasjit S. Ahluwalia et al., *Correlates of Controlled Hypertension in Indigent, Inner-City Hypertensive Patients*, 12 *J. GEN. INTERNAL MED.* 77, 77 (2002); see also U.S. Dept. of Health & Human Services, *Research on Social and Behavioral Interventions to Increase Organ Donation Grant Program 1999-2004*, <http://organdonor.gov/dtcp/minoritycampaign.html> (last visited June 15, 2014).

Finally, health policy has traditionally been conducted at the local level. Transplant policy in particular has largely been organized regionally. State governments maintain waiting lists, legal rules concerning deceased donation and consent are contained in state statute, and transplants are facilitated by regional entities called organ-procurement organizations (OPOs). Indeed, looking to the history of transplant policy demonstrates how it has traditionally been a state-level concern, making conservative interpretations of federal rules particularly appropriate.

Ultimately, then, there are powerful normative reasons for bringing a federalism-based approach to the forefront of transplant policy. These arguments alone would counsel a narrow construction of NOTA section 301 as banning only commercial exchanges, but, helpfully, further arguments, based on states' historical control over organ-transplantation policy, are available.

Organ-transplantation policy has not always been a matter of federal oversight. Prior to the enactment of NOTA, the federal government essentially left this issue to the states. Indeed, the first policy effort to address organ scarcity in the United States was initiated at the state level with the enactment of the Uniform Anatomical Gift Act (UAGA) in 1968.<sup>80</sup>

The UAGA was a model law developed by the National Conference of Commissioners for Uniform State Laws and adopted in nearly identical form by all fifty states and the District of Columbia by the early 1970s.<sup>81</sup> The Conference convened a group of highly esteemed individuals, recruited and appointed by various state governors, to draft an organ-transplant policy. E. Blythe Stason, professor of law and former dean and provost of the University of Michigan, chaired the commission.<sup>82</sup>

The UAGA focused primarily on *who* possessed the jurisdiction over organs of the deceased for the purposes of donation, and under what circumstances organ donation could be made.<sup>83</sup> But that is not all the act did. The commissioners, led by Stason, also made strides toward considering incentives as a means of organ procurement: They left the question open for individual state legislatures to resolve through the democratic process.<sup>84</sup>

Although commentators differ on whether the omission from the UAGA of direct language on this point was intentional or an oversight, there are indications that leaving the question of incentives for states to decide was

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80. N.J. LAW REVISION COMM., REPORT AND RECOMMENDATION ON THE UNIFORM ANATOMICAL GIFTS ACT (1987) at 2, *available at* <http://www.lawrev.state.nj.us/rpts/anagft.pdf> [hereinafter Report and Recommendation].

81. *Id.*

82. *Memorial Resolution by the University of Michigan Law Faculty Concerning E. Blythe Stason*, 71 MICH. L. REV. 451 (1973) [hereinafter *Memorial Resolution*]. Stason also served as the Frank C. Rand Distinguished Professor of Law at Vanderbilt University during the drafting of the UAGA.

83. Uniform Anatomical Gifts Act, § 23-06.6-01 (1978), *available at* <http://www.legis.nd.gov/cencode/t23c06-6.pdf?20140420153611>.

84. E. Blythe Stason, *Uniform Anatomical Gift Act*, 23 BUS. LAW. 919-27 (1968); Michele Goodwin *The Body Market: Race Politics & Private Ordering*, 49 ARIZ. L. REV. 599 (2007).

reasoned and deliberate. As a dean, provost, and commissioner, Stason was known for being meticulous, methodical, and purposeful in the examination of ideas and the implementation of policies.<sup>85</sup> With Stason at the helm of the commission, if the framers intended to ban the sale of organs, they would have done so.<sup>86</sup>

In any case, Stason made his views clear. He said that the UAGA drafters contemplated incentives and supported allowing states the flexibility to decide those matters. In interviews and writings after the enactment of the UAGA, the commission chair remarked that the question of payments was intentionally left open for states to decide.<sup>87</sup> Demonstrating a nuanced view of what organ transplantation in the United States could become, Stason acknowledged that the possibility of donors demanding payments might arise, but he did not hold that all payments would be unethical, immoral, or illegal.<sup>88</sup> According to Stason, the commissioners felt that “the matter [of payments] should be left to the decency of intelligent human beings.”<sup>89</sup> In taking this position, Stason adhered to Justice Louis Brandeis’s famous admonition that federalism allows for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country . . . .”<sup>90</sup>

After presenting the UAGA model law to their home states for ratification and enactment, legislators sought to work within the spirit of the original draft. In a radical shift, states that had previously enacted laws to ban payments for organs and body parts—among them Massachusetts, Delaware, Hawaii, Maryland, and New York—*repealed* them.<sup>91</sup> For the next sixteen years, the 1968 UAGA, as adopted by the states, was the only law governing organ transplantation in America.<sup>92</sup> When Congress adopted NOTA, it therefore did so against the backdrop of a legal regime in which organ donation incentives had been left to states’ autonomous decisions.

#### E. The DOJ and UNOS Have Already Narrowly Construed Section 301

As reviewed above, the text, the legislative history, and the statutory

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85. *Memorial Resolution*, *supra* note 82.

86. Stason, *supra* note 84, at 928 (assuming that payment would be rare and that crafting a prohibition would “not be easy” and concluding that until payment “becomes a problem of some dimensions,” the matter should not be addressed through legislative prohibition).

87. *See, e.g., id.* at 921–24.

88. *Id.* at 927.

89. *Id.*

90. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

91. *See* Act of June 12, 1967, ch. 353, § 7, 1967 Mass. Acts 202, 202 (repealed 1971) (prohibiting the sale of organs, body parts, and tissues after death); *see also* Law of August 1, 1968, ch. 429, § 1780, 56 Del. Laws 1773, 1773 (1967) (repealed 1970); Act of May 20, 1967, ch. 94, § 1, 1967 Haw. Sess. Laws 91, 91 (repealed 1969) (prohibiting the sale of bodies after death); Law of April 24, 1961, ch. 315, § 1, 1961 Md. Laws 397, 398 (repealed 1968); Law of April 22, 1964, ch. 702, § 1, 1964 N.Y. Laws 1827, 1828 (repealed 1971).

92. Report and Recommendation, *supra* note 80.

purposes of NOTA section 301(a) lead to the conclusion that state benefits should lie outside the scope of section 301's ban. The DOJ's OLC reviewed the scope of section 301 using similar analysis in a 2007 memorandum and interpreted it to have a narrow application to transactions clearly and definitely commercial.<sup>93</sup> Inasmuch as NOTA's criminal penalties would be prosecuted by the DOJ, their analysis of section 301(a) is persuasive evidence of the best reading of NOTA section 301.<sup>94</sup>

The DOJ memorandum concerned paired exchanges, which help patients who already have a willing donor but cannot receive the kidney because of biological incompatibility. If this mismatched couple can trade with another mismatched couple, the transplants can take place, with the donor from couple A giving his kidney to the compatible recipient of couple B, and vice versa. The virtue is that two lives are saved instead of none. Without the exchange, both patients would languish on dialysis.

In determining that paired exchanges did not violate section 301, the DOJ acknowledged the murkiness surrounding the statutory language "valuable consideration." Noting that valuable consideration is defined in the statute by what it is not (reimbursement for expenses related to donation), the DOJ memorandum said "the vague phrase 'valuable consideration' addresses organ transfers that could be considered to involve a 'purchase' rather than all donations that may involve some exchange."<sup>95</sup> According to the Congressional Research Service (CRS), which was also called upon to review NOTA in this context, "[t]he legislative history of the 1984 NOTA does not discuss the meaning of the term 'valuable consideration'. It simply expresses Congress's intent to criminalize the buying and selling of organs for profit."<sup>96</sup> The DOJ went even further than the CRS and stated that because section 301 is a criminal statute, it must be interpreted narrowly under the rule of lenity.<sup>97</sup> As such, "valuable consideration" is best understood "as referring to the buying and selling of organs for monetary gain or to organ exchanges that are otherwise *commercial*."<sup>98</sup>

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93. Marshall Memorandum, *supra* note 72.

94. The DOJ prosecutes federal law offenders and represents the U.S. government in court; its attorneys represent the rights and interests of the American people and enforce federal criminal and civil laws. See *About DOJ*, U.S. DEPT' JUST., <http://www.justice.gov/about/about.html> (last visited Mar. 10, 2014).

95. Marshall Memorandum, *supra* note 72, at 2–3.

96. ERIN D. WILLIAMS, BERNICE REYES-AKINBILEJE & KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., RL33902, LIVING ORGAN DONATION AND VALUABLE CONSIDERATION 9 (2007), available at [http://assets.opencrs.com/rpts/RL33902\\_20070308.pdf](http://assets.opencrs.com/rpts/RL33902_20070308.pdf).

97. Marshall Memorandum, *supra* note 72, at 6.

98. *Id.* at 5, 6–7 (emphasis added). One commentator on the DOJ's legal analysis has stated, DOJ's analysis focused heavily on the involvement of *monetary* value in the transfer of human organs and how the presence or absence of monetary value impacts the conclusion that a transaction contains "valuable consideration." This focus apparently enabled the DOJ to address the issue at hand as to whether something *not* of monetary value—the kidney exchange programs—could be "valuable consideration." At this point, the devil is in the detail. The DOJ concluded that for consideration to be *valuable* it must involve something of "pecuniary, readily convertible into monetary value." It did not,

Ultimately, the DOJ determined that “the legislative history does not suggest that any Member of Congress understood the bill as addressing non-monetary or otherwise non-commercial transfers.”<sup>99</sup> Therefore, a transfer of an organ through paired exchange does not involve “valuable consideration.”<sup>100</sup>

Similarly, General Counsel to UNOS also undertook a legal analysis of paired donations in the context of section 301.<sup>101</sup> According to the network’s 2006 position paper, “NOTA § 301 is legally and historically inapplicable to today’s living donation arrangements.”<sup>102</sup> Paired exchange preserves the essential elements of a gift which are, firstly, “donative intent,” meaning an intention to give without accrual of material personal benefit—the living donor gives up something, for example a kidney, and knowingly assumes additional health risk, secondly, actual presentation of the kidney, and, finally, its acceptance without payment.<sup>103</sup> Noting that Congress’s intent in enacting NOTA was to criminalize the purchase and sale of organs for profit, as in commercial business transactions, by defining valuable consideration “as monetary transfer or a transfer of valuable property between donor, recipient, and/or organ broker in a sale transaction,”<sup>104</sup> counsel to UNOS also concluded that paired kidney donations involved conditional gifts and were, therefore, not restricted by section 301.

Congress ultimately adopted the Norwood Act on December 21, 2007,<sup>105</sup> which amended NOTA to expressly exempt paired donations from “valuable consideration.”<sup>106</sup> Accordingly, the specific question examined by the DOJ and

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however, conclude the converse: that all things of “pecuniary, readily convertible into monetary value” are “valuable consideration.” The DOJ ultimately said that “valuable consideration” in section 301(a) of NOTA refers to the “buying and selling of organs for monetary gain or to organ exchanges that are otherwise commercial.” The fundamental distinction drawn, therefore, was not between the monetary or nonmonetary value of the thing transacted but between the commercial as opposed to noncommercial nature of the transactions.

Jones, *supra* note 22, at 1086–87.

99. Marshall Memorandum, *supra* note 72, at 3 n.2.

100. Rick Jones, in *The Gift of Life and “Diseases of Language,”* further commented that, “inasmuch as the kidney exchange programs reviewed by the Department of Justice did not have any clear pecuniary transfer, they were deemed not to involve valuable consideration because without obvious monetary value in the exchange there was no *valuableness* in the transfer. Without *valuableness* there could be no *valuable* consideration.” *Supra* note 22, at 1088 (emphasis in original).

101. WILLIAMS MULLEN, INTENDED RECIPIENT EXCHANGES, PAIRED EXCHANGES AND NOTA § 301, at 1 (2003).

102. *Id.* at 2.

103. Numerous court cases have found that gifts cannot contain consideration. See *Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn. Ct. App. 1996) (“[C]onsideration is what distinguishes a contract from a gift.”); *Bolles v. Toledo Trust Co.*, 4 N.E.2d 919, 919 (Ohio 1936) (noting that there is no consideration in a gratuitous transfer); *Rusk v. Rusk*, 5 S.W.3d 299, 303–05 (Tex. App. 1999) (holding that absence of consideration is key to finding a legal gift); *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726, 730–31 (Tex. App. 1993) (stating that lack of consideration is an essential characteristic of a gift).

104. MULLEN, *supra* note 101, at 2.

105. Pub. L. No. 110-144, 121 Stat. 1813 (2007) (codified at 42 U.S.C. §§ 273b, 274e (2006 & Supp. IV 2011)).

106. 42 U.S.C. § 274e (2006 & Supp. IV 2011).

UNOS, whether paired donations violated the pre-Norwood version of section 301, is moot. Nonetheless, the DOJ and UNOS analyses are highly instructive, because they both strongly support a narrow interpretation of “valuable consideration” as involving purely commercial endeavors. Thus, the DOJ analysis confirms what seems perfectly clear from the other sources considered: NOTA should be read narrowly, to ban only commercial exchanges of organs—not state-benefit programs.

### III

#### THE PENNSYLVANIA EXPERIENCE

Notwithstanding the strong statutory basis for concluding that NOTA does not ban state-benefit programs, the law has nonetheless in fact impeded states from adopting such programs. To that end, we now consider the struggle that accompanied Pennsylvania’s funeral-benefit law, the only state law to test the scope of NOTA’s ban on valuable consideration. That Pennsylvania is the only state to have even tested NOTA’s scope itself suggests that the law may be having a chilling effect.

In 1994, the Pennsylvania legislature unanimously passed the Burial Benefit Act,<sup>107</sup> which provided modest reimbursement of hospital or burial expenses of deceased donors—expenses that would have been incurred whether or not the organs of the deceased were retrieved. Signed into law by then-Governor Robert P. Casey, Sr., who underwent a heart–liver transplant in 1993, state authorities said that the act was intended as a “thank you” to the donating family.<sup>108</sup> In fact, the law was inspired by the details of Casey’s circumstance: His very own donor’s parents needed financial help to cover the burial of their son. The primary sponsor of Act 102 said that the burial provision was intended to spare other donor families the same financial stress.<sup>109</sup>

The idea of a funeral benefit garnered support. At that time, The American Medical Association (AMA) engaged the matter through its Council on Ethical and Judicial Affairs, which concluded in a 1995 statement that forms of financial incentives that stop short of outright cash payment “may be ethically permissible” and suggested that a pilot study be conducted.<sup>110</sup> In 2008, they reasserted the legitimacy of studying incentives for deceased donation when the AMA House of Delegates voted to put the prospect of paying posthumous

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107. 20 PA. CONS. STAT. § 8 (1994).

108. See C.L. Bryce et al., *Do Incentives Matter? Providing Benefits to Families of Organ Donors*, 5 AM. J. TRANSPLANTATION 2999 (2005).

109. See LEGIS. BUDGET & FIN. COMM., A PERFORMANCE EVALUATION OF PENNSYLVANIA’S ORGAN AND TISSUE DONOR AWARENESS PROGRAM CONDUCTED PURSUANT TO HR-698 OF 2006, at S-8 (2007), available at <http://lbfc.legis.state.pa.us/reports/2007/291.PDF> [hereinafter LB&FC REPORT].

110. Council on Ethical and Judicial Affairs, Am. Med. Ass’n, *Financial Incentives for Organ Procurement: Ethical Aspects of Future Contracts for Cadaveric Donors*, 155 ARCHIVES INTERNAL MED. 581, 587 (1995).



organ donors high on its legislative agenda.<sup>111</sup>

Pennsylvania's act established the Organ Donation Awareness Trust Fund to which state residents could contribute.<sup>112</sup> It authorized use of 10 percent of that fund to defray medical or funeral expenses of the deceased, with an upper limit of \$3000 for any one family, although at the time of creation the fund was only large enough to offer \$300 to each family of the 400 anticipated donors.<sup>113</sup>

From 1994 to 1999, the Pennsylvania legislature invested significant financial and community resources in studying whether Act 102 would conflict with federal law.<sup>114</sup> Despite support for pilot studies from groups like the National Kidney Foundation (NKF) and the AMA, the legal counsel to the State Department of Health believed that it would violate NOTA's prohibition on the transfer of organs for "valuable consideration."<sup>115</sup> The Pennsylvania funeral benefit therefore stalled in the final stage, lacking only a signature from the state secretary of health.<sup>116</sup> The state sought clarification of this question from the DOJ, but received none.<sup>117</sup> Finally, the Pennsylvania Department of Health decided not to test the limits of NOTA and instead directed the funds intended for incentives away from funeral expenses for the deceased and toward reimbursement for food, travel, lodging, and lost wages incurred by living donors—reimbursements explicitly permitted under NOTA section 301(c)(2).<sup>118</sup>

Subsequent efforts to revive the funeral benefit failed. In March 2000, counsel from an OPO in Pennsylvania made an impassioned plea to the department of health's chief counsel to implement the funeral-expense pilot

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111. See Kevin B. O'Reilly, *AMA Meeting: Delegates Seek to Change Law on Organ Donor Incentives*, AM. MED. NEWS (July 7, 2008), <http://www.amednews.com/article/20080707/profession/307079949/7/>.

112. See Christopher Snowbeck, *Committee Approves Plan to Reward Families for Relatives' Organ Donations*, PITTSBURGH POST-GAZETTE, June 10, 1999, at B7.

113. See Sheryl Gay Stolberg, *Pennsylvania Set to Break Taboo on Reward for Organ Donations*, N.Y. TIMES, May 6, 1999, at A1. Financial constraints aside, \$300 was coincidentally the amount deemed ethically sound by a panel of consultant bioethicists convened by the Pennsylvania physician general in 1999 on the order of Pennsylvania secretary of health. The amount, the bioethicists decided, fell below a level they believed would be an inducement to donate, yet still represented a gratuitous gesture. LB&FC REPORT, *supra* note 109, at 116.

114. LB&FC Report, *supra* note 109, at 111–12. Key components of Act 102 are (1) to increase the requirements placed on hospitals regarding the organ donation process, 20 PA. CONS. STAT. § 8617 (2006), (2) to increase public awareness of organ donation, *id.* § 8622(b)(3), (3) to establish a fifteen-member Organ Donation Advisory Committee, *id.* § 8622(c), and (4) to create the Governor Robert P. Casey Memorial Organ and Tissue Donation Awareness Trust Fund, *id.* § 8622(a). Act 102 was amended in 2000 to rename the trust fund after Governor Casey who died in 2000. See Act of Dec. 20, 2000, Pub. L. No. 2000-120 (codified as amended at 20 PA. CONS. STAT. § 8622(a)).

115. LB&FC REPORT, *supra* note 109, at 116.

116. Interview with Howard Nathan, President & CEO, Gift of Life Donor Program, in Philadelphia, Pa. (Sept 17, 2007).

117. Christopher Snowbeck, *Organ Donor Funeral Aid Scrapped*, PITTSBURGH POST-GAZETTE, February 1, 2002, at B1.

118. See Robert Arnold et al., *Financial Incentives for Cadaver Organ Donation: An Ethical Reappraisal*, 73 TRANSPLANTATION 1361, 1366 (2002).

program.<sup>119</sup> The OPO counsel argued that the NOTA prohibition is limited to the *selling* of organs for profit and that “it is inconsistent with the express language of [NOTA], as well as the legislative history, to broaden the prohibition well beyond its express words to somehow prohibit the *reimbursement* of a portion of the funeral expenses of an organ donor.”<sup>120</sup> The counsel further underscored that, as a criminal statute, NOTA section 301(a) “should be strictly construed and strictly limited to pure commercial transactions in human organs.”<sup>121</sup> “To do otherwise ‘would violate the basic tenets of statutory construction and criminalize conduct that [was] never expressly addressed.’”<sup>122</sup> But the state department of health refused to seek federal guidance, insisting that a proposed pilot trial of burial benefits would violate NOTA.<sup>123</sup>

On a number of occasions in 2003 and again in 2004, the Pennsylvania Organ Donation Advisory Committee raised the subject of the funeral-expense pilot.<sup>124</sup> By March 2006, the advisory committee had developed another proposal for funeral benefits but the secretary of health concluded that the committee should instead work with OPOs to develop a proposal for a pilot study of reimbursement for grief-counseling expenses.<sup>125</sup>

In 2007, the Pennsylvania General Assembly undertook an evaluation of the state’s Organ and Tissue Donor Awareness Program, including the funeral benefit allowed for by Act 102.<sup>126</sup> The report concluded that “there are indications that a [funeral benefit] proposal could be crafted that would not violate [NOTA]” and recommended as follows:

The [Pennsylvania] Department of Health should take steps to determine the legality, under federal law, of a funeral expense benefit for donor families that is authorized in state law and that the Organ Donation Advisory Committee has twice proposed to the Department as a pilot project. Specifically, the Department should reassess—in light of the recent federal Department of Justice opinion relating to kidney exchange programs and its analysis of valuable consideration under NOTA Section 301—whether implementing a pilot funeral benefit program as required by Act 102 necessarily involves buying and selling, or an otherwise commercial transfer of organs that “clearly and definitely” is encompassed by NOTA’s prohibition on the transfer of human organs for valuable consideration.<sup>127</sup>

As of 2010 no action had been taken by the Pennsylvania Department of Health

119. LB&FC REPORT, *supra* note 109, at 116.

120. *Id.* at 117.

121. LB&FC REPORT, *supra* note 109, at 126.

122. *Id.*

123. *See id.*

124. LB&FC REPORT, *supra* note 109, at 117.

125. *Organ Donation Grief Counseling Program*, PA. DEP’T HEALTH, [http://www.portal.state.pa.us/portal/server.pt/community/organ\\_donation\\_awareness/18861/organ\\_donation\\_grief\\_counseling\\_program/830747](http://www.portal.state.pa.us/portal/server.pt/community/organ_donation_awareness/18861/organ_donation_grief_counseling_program/830747) (last visited Mar. 10, 2014).

126. H.R. Res. 698, 2006 Gen. Assemb. (Pa. 2006); *see* LB&FC REPORT, *supra* note 109, at S-8, S-9.

127. *See* LB&FC REPORT, *supra* note 109, at S-31. More specifically, the report recommended that the department of health “examine the prospect for funeral benefits again, issue an opinion on moving forward, and develop a written proposal for doing so.” *Id.* at S-31.

on these recommendations.<sup>128</sup> The Pennsylvania experience with state-benefit programs confirms that clarification of NOTA section 301 would be beneficial, regardless of whether or not NOTA section 301 is currently being properly interpreted. States need more clarity so they can better address the organ shortage.

#### IV

##### THE LIMITATIONS OF CONCRETE APPLICATION

As stated above, reasonable state incentives provided to increase organ donation, if not clearly and definitely commercial, should be allowable under the language and intent of NOTA section 301(a). Pragmatically speaking, however, there are realistic restraints on the boldness of the inducements that can be offered. For example, are incentives of \$100, \$1000, and \$1 million in value equally acceptable? Is a direct cash payment as acceptable as a tax benefit or a funeral reimbursement? There are likely limits on a benefit's amount and structure at which a reasonable person would believe that a donation was requested and accomplished in exchange for the delivery of the state benefit—indicating that a business-type inducement occurred, akin to a clear commercial activity. For example, the closer a state incentive's value is to the fair market value of an organ, the greater the chance that the incentive would be regarded as being at or near a market-type transaction and, thus, contrary to NOTA. The more direct a benefit would be, the more risk the transaction would be viewed as being openly bargained for, similar to a commercial endeavor. The less the incentive is crafted to underscore a noncommercial, public-policy purpose and intent, the greater risk it would be perceived as analogous to pursuing a commercial effect. The purpose of this article is to argue that state incentives should be allowed by NOTA at some level—not to debate the scope of their limits. Ultimately, the door to state incentives should be opened, but the limits on incentives will and should be found by way of the federalist approach advocated herein, through which varying state legal regimes will be used as laboratories to test change in this area and help measure useful and harmful features of that change.

#### V

##### STATUTORY CLARIFICATION

Because—as the Pennsylvania experience shows—states continue to question whether section 301 prohibits state-benefit programs, and, as a result, states remain reluctant to challenge the ban, clarification needs to be achieved regarding NOTA section 301(a). This should occur either by obtaining an official opinion from the DOJ that definitively interprets the law in the context

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128. See ORGAN DONATION ADVISORY COMM., THE PENNSYLVANIA ORGAN AND TISSUE DONATION ACTION PLAN 2010, at 16 (2010), available at [http://www.portal.state.pa.us/portal/server.pt/document/924960/2010organtissuedonationactionplan\\_pdf](http://www.portal.state.pa.us/portal/server.pt/document/924960/2010organtissuedonationactionplan_pdf).

of state incentive programs or by amending the law. A request should be made by the U.S. Secretary of Health and Human Services to the DOJ Office of Legal Counsel to advise on the legality of public policy-driven state incentive programs that promote organ donation, similar to what was done in the area of paired exchanges. Moreover, Congress should amend NOTA to exempt such state-benefit arrangements. Indeed, statutory amendment may be most beneficial in any event to definitively remove uncertainty on the issue and to speed the process of change.

There are two basic options for statutory reform. The first entails revising the term “valuable consideration” to exempt incentives for organ donation that are provided by a state or state-related entity. A second option is for Congress to give HHS or the DOJ authority to grant states waivers to conduct pilot trials of state-sponsored incentives for living or posthumous donation. Alternatively, the DOJ might be persuaded to agree to allow narrowly tailored pilot trials to go forward in light of the current felony provision, particularly if the Department believed the current law was ambiguous.

Since 1981, bills have been introduced to amend NOTA to allow tax deductions and tax credits for deceased donation and life-insurance policies for living donors.<sup>129</sup> None has been successful. In 1981 Representative Philip T. Crane of Illinois introduced a bill that would have offered tax incentives for transplantable organs from deceased donors. House Bill 3774 proposed “a \$25,000 deduction on the [donor’s] last taxable year plus a \$25,000 exclusion from estate taxes,” with the same incentives going to the family of a child donor.<sup>130</sup> In 1999, Representative James Greenwood of Pennsylvania introduced House Bill 3471 in order “to authorize the Secretary of Health and Human Services to carry out demonstration projects to increase the supply of organs donated for human transplantation.”<sup>131</sup> The bill would have allowed projects to establish financial incentives for organ donation, including payments for the purchase of life-insurance policies or annuities, payable to a donor’s designee.<sup>132</sup> In 2000 and 2001, Representative Christopher Smith of New Jersey introduced the Help Organ Procurement Expand Act, which would have provided a \$2500 tax credit to individuals who donated their organs while living, or to the designated beneficiaries or estates of individuals who donated their organs after death.<sup>133</sup> Representative Greenwood subsequently introduced similar bills, in 2002 and in July 2003.<sup>134</sup> In 2000 and 2001, Representative James Hansen of Utah introduced the Gift of Life Tax Credit Act, which would have amended

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129. See SATEL, *supra* note 9, at 141–43.

130. HASTINGS CTR., *Tax Incentives: A Market Solution to the Kidney Shortage?*, 11 HASTINGS CENTER REP. 3 (1981). The Crane bill was referred to the House Ways and Means Subcommittee on Health on February 16, 1982 and died in committee.

131. H.R. 2856, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2856.IH>.

132. *Id.*

133. H.R. 2090, 107th Cong. (2001); H.R. 5436, 106th Cong. (2000).

134. H.R. 2856, 108th Cong. (2003); H.R. 5224, 107th Cong. (2002).

the Internal Revenue Code to allow a (refundable) \$10,000 credit to individuals who donated their organs at death.<sup>135</sup>

In 1993, the NKF proposed that NOTA be changed to permit payments of burial expenses for donors. Its spokesperson suggested that a “standardized and small” amount, perhaps \$2000, be given through an agency within HHS to “a third party like a funeral director.”<sup>136</sup> (Inexplicably, now, over two decades later, the foundation is opposed to any proposals for donor enrichment, even though the organ shortage is currently far worse than when the NKF first endorsed pilot trials.<sup>137</sup>) A 1993 white paper by UNOS deemed incentives for deceased donation “ethically justifiable only if found preferable to the other feasible options to increase donations.”<sup>138</sup> (Again in 2002, UNOS reiterated its call for pilot studies of incentives for posthumous donation.<sup>139</sup>) As noted earlier, the American Medical Association’s Council on Ethical and Judicial Affairs concluded in a 1995 statement that forms of financial incentives that stop short of outright cash payment “may be ethically permissible” and suggests that a pilot study be conducted.<sup>140</sup>

In 1999, the House of Representatives’ Subcommittee on Health and Environment, of the Committee on Commerce, held a hearing entitled *Putting Patients First: Increasing Organ Supply for Transplantation*.<sup>141</sup> Representative James Greenwood of Pennsylvania proposed a federally funded, \$10,000 life-insurance policy for everyone in the United States, with benefits payable upon donation and transplantation of the deceased’s organs. Witnesses at the hearing were fairly unanimous in their approval of these proposed deceased-donor incentive programs, particularly if they might serve as pilot studies for broader

135. The credit would presumably go to the deceased individual’s beneficiaries or estate. When the bill was proposed in 2000 it had twenty-two cosponsors, but it only had five in 2001. Both times it was immediately referred to the House Committee on Ways and Means, and no further action was taken. H.R. 1872, 107th Cong. (2001); H.R. 4048, 106th Cong. (2000).

136. *Organ Transplant and Bone Marrow Donor Reauthorization: Hearing before the H. Comm. on Energy & Commerce, Subcomm. on Health & the Env’t*, 103d Cong. 157 (1993) (statement of A. Bruce Bowden, Vice Chairman, National Kidney Foundation).

137. See *Assessing Initiatives to Increase Organ Donations: Hearing Before the Subcomm. on Oversight & Investigations of the Comm. on Energy & Commerce*, 108th Cong. 51–54 (2003) [hereinafter *Hearing Before the Subcomm. on Oversight & Investigations*].

138. EDWARD W. NELSON, UNOS ETHICS COMM., FINANCIAL INCENTIVES FOR ORGAN DONATION: A REPORT OF THE UNOS ETHICS PAYMENT SUBCOMMITTEE (1993), available at <http://optn.transplant.hrsa.gov/resources/bioethics.asp?index=4>.

139. See *OPTN/UNOS Board Endorses Studies of Incentives to Increase Donation*, TRANSPLANT LIVING (June 28, 2002), <http://transplantliving.org/community/newsroom/2002/06/optn-unos-board-endorses-studies-of-incentives-to-increase-donation/>.

140. Council on Ethical and Judicial Affairs, Am. Med. Ass’n, *supra* note 110.

141. *Putting Patients First: Increasing Organ Supply for Transplantation: Hearing Before the Subcomm. on Health & Env’t, of the H. Comm. on Commerce*, 106th Cong. 58 (1999). Joseph L. Brand, Chairman of the Office of Scientific and Public Policy at the National Kidney Foundation stated, “We have looked at this issue with our constituents and the bottom line is, we would support at least a pilot study on financial incentives.” *Id.* He went on, “Financial incentives, if we have any data that says they are working, we ought to try them elsewhere. So we certainly would support that . . . The National Kidney Foundation has long called for demonstration projects to determine the impact of programs which would assist donor families in paying for funeral or burial expenses.” *Id.*

initiatives. The NKF expressed its support: “We are not talking about a situation where the organ goes to the highest bidder, or that there should be market for organs. We are talking about a limited, specified amount of money paid to a third party.”<sup>142</sup> According to a spokesman for the American Society of Transplantation, that organization would be in favor of “carrying out creative pilot studies to explore the possibility that quite modest financial supports may enhance organ donation,” such as that offered by the Pennsylvania program.<sup>143</sup> The president of the American Society of Transplant Surgeons (ASTS), also commenting on the Pennsylvania program, suggested that “if you would have asked this question 25 years ago . . . it would have been an absolute no . . . but I think you have got to look at this again and again and again . . .”<sup>144</sup> He later confirmed, “I personally see no ethical issue.”<sup>145</sup> John R. Campbell, executive director of the Lifelink Foundation (an OPO serving Florida, Georgia, and Puerto Rico) said, “We believe this will provide the organ donation and transplantation community an opportunity to view Pennsylvania as a pilot state for the rest of the nation . . . . If rates of donation increase, we may want to consider a similar initiative.”<sup>146</sup>

In 2003, another congressional hearing was held to discuss strategies to increase the organ supply. A hearing entitled *Assessing Initiatives to Increase Organ Donations* was conducted before the House’s Subcommittee on Oversight and Investigations, of the Committee on Energy and Commerce. Although strong objections were proffered against the use of direct monetary incentives to procure organs, many witnesses endorsed funeral support. The AMA representative, for example, encouraged “the medical community to support the reexamination of motivation for cadaveric organ donation,”<sup>147</sup> as did the president of the ASTS,<sup>148</sup> who testified about continuing interest in studying “various methods and programs to increase donation rates that may have a financial component,” such as offering “a modest funeral expense benefit to the family of a decedent donor, not as a payment for a donated organ, but as a token of thanks.”<sup>149</sup> In their presidential addresses, ASTS Presidents in 2006 and 2007 explicitly endorsed pilot trials of incentives for organ donation—both living and posthumous.<sup>150</sup>

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142. See Sheryl Gay Stolberg, *Pennsylvania Set to Break Taboo on Rewards for Organ Donations*, N.Y. TIMES, May 6, 1999, at A1.

143. *Putting Patients First: Increasing Organ Supply for Transplantation: Hearing Before the Subcomm. on Health & Env’t, of the Comm. on Commerce*, 106th Cong. 80 (1999).

144. *Id.* at 58.

145. *Id.* at 74.

146. *Id.* at 65. LifeLink’s strategies involved simplifying the donation process, improving the training of hospital employees who approach bereaved families for donor organs, and establishing a strong liaison program between hospitals and organ-procurement organizations. *Id.* at 14.

147. *Hearing Before the Subcomm. On Oversight & Investigations*, *supra* note 137, at 53–54.

148. *Id.* at 62.

149. *Id.* at 58 (statement of Abraham Shaked, President, American Society of Transplant Surgeons).

150. See Richard N. Fine, *Presidential Address at the 2006 World Transplant Congress* (July 19,

When asked by Representative Greenwood what they thought of incentives, the president-elect of the Association of Organ Procurement Organizations (AOPO) stated that the AOPO would support pilot projects for incentives,<sup>151</sup> and the president-elect of UNOS said his organization “in essence . . . backed the AMA stance.”<sup>152</sup> That same year, the AMA issued a report encouraging pilot trials of incentives for posthumous donation. The report mentioned funeral benefits as well as tax credits to the donor’s estate or a payment to a charity designated by the donor prior to death.<sup>153</sup> Oddly, the NKF became opposed to the proposed initiatives, saying that “[a]ny attempt to assign a monetary value to the human body or its body parts, even in the hope of increasing organ supply, diminishes human dignity and devaluates the very human life we seek to save.”<sup>154</sup>

In 2002, the Advisory Committee on Organ Transplantation (ACOT) of the Department of Health and Human Services, whose role is to assist the HHS secretary in “[a]ssuring the public that the [transplant] system is as effective and equitable as possible,”<sup>155</sup> recommended a demonstration project on incentives for deceased donations.<sup>156</sup> During its 2004 meeting, ACOT considered the legality of fourteen different organ-donation incentive options, one of which was the payment of funeral expenses for deceased donors.<sup>157</sup> The council found that a funeral-benefit program, although not clearly acceptable under NOTA, would be an “ideal” study and voted to keep the funeral-benefits concept under

2006), <http://www.myast.org/content/richard-n-fine-md-2006-presidential-address> (“Is it wrong for an individual . . . who wishes to utilize part of his/her body for the benefit of another and in return will be provided with financial compensation that could obliterate a life of destitution for the individual and his/her family?”). Jeffrey Crippen of the American Society of Transplantation and Arthur Matas of the ASTS indicated support for financial-incentive trials in their presidential addresses at the Second World Transplant Congress. See Anthony Monaco, *Financial Rewards for Organ Donation: Are We Getting Closer?* 7 EXPERT REV. PHARMACOECONOMICS & OUTCOMES RES. 303 (2007). A poll taken at the annual meeting of the ASTS suggests considerable support for Fine’s sentiments, revealing that eighty to eighty-five percent of members were in favor of studying incentives for living donors. J.R. Rodrigue et al., *Stimulus for Organ Donation: A Survey of the American Society of Transplant Surgeons*, 9 AM. J. TRANSPLANTATION 2172 (2009).

151. *Hearing Before the Subcomm. On Oversight & Investigations, supra* note 137, at 22–23.

152. *Id.* at 43.

153. See FRANK A. RIDDICK, JR., REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS 3 (2002), available at <http://www.ama-assn.org/resources/doc/code-medical-ethics/2151a.pdf>. The report also stated that “AMA policy has supported certain forms of financial incentives for cadaveric organ donation since 1993.” *Id.* at 1.

154. *Hearing Before the Subcomm. On Oversight & Investigations, supra* note 137, at 51–54.

155. U.S. Dep’t of Health & Human Services, *Mission and Meeting-Notes Archive of the Advisory Committee on Organ Transplantation*, ORGANDONOR.GOV, <http://organdonor.gov/legislation/advisory.html> (last visited Mar. 11, 2014).

156. Jim Warren, *ACOT Recommends Set of Live Donor Standards; Spotlight Now on HHS Secretary Thompson’s Response*, TRANSPLANT NEWS, Nov. 27, 2002, at P1. The ethics committee of the ASTS was in favor of a token reward to families who donate; this offer was explicitly meant as a “thank you,” not an inducement. See Jim Warren, *ASTS Ethics Committee Endorses Pilot Program to Test a Financial Incentive to Increase Organ Donation*, TRANSPLANT NEWS, May 28, 2002, at P1.

157. U.S. Dep’t of Health & Human Servs., *Summary Meeting Notes from May 2004 Meeting*, ORGANDONOR.GOV, <http://organdonor.gov/legislation/acotmay2004notes.html> (last visited Mar. 11, 2014) [hereinafter U.S. Dep’t of Health & Human Servs., *Summary Meeting Notes*].

consideration. It concluded that “clarification and greater specificity [was needed] in regard to the broad and somewhat confusing prohibition of valuable consideration in the context of organ donation.”<sup>158</sup>

Notably, ACOT recommended amending NOTA to give HHS discretion in further defining “valuable consideration.”<sup>159</sup> It also noted that, “[r]egulatory authority is both more flexible and more responsive to innovation than an expanded statutory list of practices that are not included in the term ‘valuable consideration.’”<sup>160</sup> The committee concluded “that a process to limit the scope of ‘valuable consideration’ would encourage the development of ethical practices to increase the supply of human organs and provide certainty to the transplant community about the scope of permissible activities.”<sup>161</sup>

The council also listed the serious consequences of lack of clarity on the meaning of the term “valuable consideration.” They included,

“Uncertainty about federal preemption of state law could deter state legislative action to create incentives intended to increase organ donation[;]

Risk of criminal prosecution for innovative programs that provide incentives to increase donation[;]

Federal preemption of state laws that create incentives to enhance donation on the grounds that the state law conflicts with the federal prohibition.”<sup>162</sup>

In 2008, the AMA reasserted the legitimacy of studying incentives for deceased donation. The AMA House of Delegates voted in June to put the prospect of paying posthumous organ donors “high on its legislative agenda,” though the association appears to have done little to promote it among legislators.<sup>163</sup> But the most far-reaching proposal yet came when the late Senator Arlen Specter of Pennsylvania circulated a draft bill in 2008–2009, the Organ Donor Clarification Act, “to clarify that laws that honor and reward organ donation are not preempted by Federal criminal law and acceptance of such government benefits is not criminal.”<sup>164</sup> Notably, the Specter proposal was not limited to deceased donation. The key language of his bill, which was never submitted, is as follows:

The Federal and state governments enjoy constitutional powers to provide benefits that honor, reward, and encourage benevolent behavior deemed to be in the general welfare and public interest. The exercise of these sovereign powers to provide a benefit to those citizens who voluntarily donate the gift of life to fellow citizens is not commercial in nature, it does not constitute a commercial sales transaction, and it does not violate Federal law if a government program provides benefits, including, but not limited to, burial benefits, “gift of life” medals, tax credits for donors, tax credits for employers who pay lost wages, tax deductions, discounts or waivers of drivers’ license

158. *Id.*

159. U.S. Dep’t of Health & Human Servs., *Recommendations 36-41 from November 2004 Meeting*, ORGANDONOR.GOV, <http://organdonor.gov/legislation/acotreccs3641.html> (last visited Mar. 11, 2014).

160. *Id.*

161. *Id.*

162. U.S. Dep’t of Health & Human Servs., *Summary Meeting Notes*, *supra* note 157.

163. Kevin B. O’Reilly, *AMA Meeting: Delegates Seek to Change Law on Organ Donor Incentives*, AM. MED. NEWS, (July 7, 2008), <http://www.amednews.com/article/20080707/profession/307079949/7/>.

164. Organ Donation Clarification and Antitrafficking Act of 2008, 111th Cong (2008).



fees, comprehensive health care for life, health and life insurance, disability and survivor benefits, a financial contribution to a charity of the donor's choosing, the numerous benefits provided to veterans such as college tuition, or preference on the transplant waiting list for an individual who has donated an organ.

Any government program that provides a benefit to honor, reward, and encourage organ donation should be devised and implemented in a manner consistent with the federal regulations that establish procurement, allocation, and transplantation protocols to prevent abuse, exploitation, or coercion.<sup>165</sup>

An amendment to NOTA could extend exclusion from the definition to any in-kind material benefits provided by federal, state, or local government to an organ donor. Such a revision would create no federal mandate or allocation. It would simply open the door to states to experiment, a development that almost came to fruition in Pennsylvania. What is more, it would allow Congress to specify what the limits are on state programs, rather than having administrators, policymakers, and lawmakers guess about how courts will interpret the term "consideration."

As discussed above, one amendment to NOTA has been adopted. In 2007, Congress enacted the Charlie W. Norwood Living Organ Donation Act to amend section 301 so that it explicitly exempted paired donations. If paired donations do not involve monetary compensation, they nonetheless enter into quid pro quo territory. Legal scholar Sherry Colb has argued that "in-kind markets" are already legal in the form of kidney swaps, arrangements that represent the exchange of kidneys for valuable things. In the case of paired exchange, that valuable thing happens to be a kidney.<sup>166</sup> After all, she has argued, kidney swaps are driven by self-interest, not altruism. Should the fact that the currency in a paired exchange is compatible kidneys—rather than a tax credit, tuition voucher, or retirement supplement—place such exchanges in a completely different ethical category from ordinary market events? Colb has described two hypothetical women. First, there is Cathy—who seeks to exchange her kidney for a monetary reward, which she will use to pay for her husband's life-saving surgery. And then Carla, who is biologically incompatible with her own husband but donates a compatible kidney to a recipient of another unmatched pair recipient (whose donor then gives his compatible kidney to Carla's husband) thereby saving Carla's spouse from dialysis and premature death. Carla cannot get her husband the kidney he needs with cash, so she uses her own kidney as currency instead. In both cases, a woman is giving a stranger a kidney that she would otherwise keep inside her own body. "In both cases," Colb has written, "she is doing so because she prefers to part with a kidney than with her husband."<sup>167</sup>

Even beyond the paired donations allowed by the Norwood Act, newer

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165. *Id.* at § 2.

166. See Sherry F. Colb, *Donor Chains and the Legality of Compensating Kidney Donors: Critically Assessing Our Moral Intuitions*, VERDICT (March 7, 2012), <http://verdict.justia.com/2012/03/07/donor-chains-and-the-legality-of-compensating-kidney-donors>.

167. *Id.*

arrangements, known as NEAD (nonsimultaneous, extended, altruistic, donor) chains, might also be made available. Such chains comprise a number of unmatched pairs plus a nondirected altruistic donor, a stranger or good samaritan, who offers a kidney to someone chosen not by the donor but by the local transplant center or OPO. The nondirected donation kicks off a chain of transplants between the nonmatched pairs that may take many months to complete. The concept behind NEAD chains is that donors “pay it forward” after their loved one receives a transplant.<sup>168</sup> Kieran Healy and Kimberly D. Krawiec situate NEAD chains in between a cascade of gift-giving and a sequence of formal contracts. Like swaps, chains rely on a norm of reciprocity, yet at the same time they “resemble a string of promises and commitments to deliver something in exchange for some valuable consideration – that is, a series of contracts,” as Healy and Krawiec put it.<sup>169</sup>

In some respects, the Norwood Act was a bigger change to NOTA than a possible amendment authorizing funeral benefits. Paired donation is clearly a conditional arrangement in which a donor would never agree to act if a second donor did not promise to act as well. Then again, swaps and chains do not resemble commercial exchanges insofar as money is not being exchanged and all participants came to the swap arrangements because they possessed donative intent; that is, they were initially fully prepared to engage in a standard altruistic donation. However, whether or not the Norwood Act allows exchanges that are more or less commercial than state-benefit programs, does not affect the bottom line: State-benefit programs are consistent with NOTA section 301, and the section should be amended to make this clear.

## VI CONCLUSION

There likely does exist a realistic limit to the scope of any potential state benefit past which the state would be viewed as engaging in a business-type inducement contrary to the intent of NOTA. But reasonable benefits that are given by state governments to promote a policy of encouraging organ donation should not be interpreted as violating NOTA because these benefits are not clearly and definitively commercial and, as such, do not constitute “valuable consideration” as that term is commonly defined within the law.

The legislative intent or policy rationales driving NOTA also do not counsel any different result. Much to the contrary, Congress’s intent in passing NOTA was to ban commercial exchanges of organs like those proposed by H. Barry

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168. Michael A. Rees et al., *A Nonsimultaneous, Extended, Altruistic-Donor Chain*, 360 *NEW ENG. J. MED.* 1096 (2009). Because the operations do not take place simultaneously, as they do with organ swaps, a concern is whether the donor half of an unmatched pair might renege on his or her promise to donate once the partner has already received a kidney. For discussion of contracting for damages as a way to foster commitment among participants, see Kieran Healy & Kimberly D. Krawiec, *Custom, Contract, and Kidney Exchange*, 62 *DUKE L.J.* 645 (2012).

169. *Id.* at 645.

Jacobs—not to prohibit state-benefit programs. Similarly, the policy rationales underlying NOTA are not implicated by state-benefit programs.

Canons of statutory construction further support reading NOTA section 301 narrowly, thereby allowing for state-benefit programs. Inasmuch as NOTA section 301(a)'s ban is enforceable through criminal penalties, it should be read narrowly because the full scope of its meaning is not clearly evident from NOTA itself. State benefits for organ donation should not be interpreted to violate NOTA because federalism requires that leeway should be given and courts should be reluctant to preempt state authority in devising public-policy driven efforts to provide benefits to organ donors. Federalist analysis informs the NOTA question not just as part of a statutory canon, but also as a wider normative lens.

The DOJ's treatment of NOTA in the paired exchange context supports all that has been said above. The primary enforcer of NOTA section 301 has read that section narrowly.

Of course, refreshing the statutory analysis of NOTA does little to solve the on-the-ground confusion in interpreting the law. Pennsylvania provides the test case. There, fear that NOTA banned state-benefit programs eventually scuttled an ambitious funeral-voucher program. To avoid this result in the future, an official interpretation should be acquired from the DOJ, or NOTA should be amended to expressly allow for state benefits.

One final piece of supporting evidence: Both the public and experts are in favor of donor compensation. Polls and surveys reveal four trends: (1) among the general public, the majority either endorses in-kind donor rewards or is neutral; (2) the number of people who report that incentives make donation appear more attractive to them outnumber those who say that an incentive option would make them less likely to donate; (3) youthful cohorts are more receptive to incentives than their older counterparts; and (4) the public is more amenable to the idea than are medical professionals.<sup>170</sup> In addition, many interest groups have endorsed the idea of pilot studies on government benefits to encourage organ donation. They include the HHS's ACOT; UNOS;<sup>171</sup> the AOPO; the American Association of Kidney Patients;<sup>172</sup> the American Society of Transplantation; ASTS;<sup>173</sup> and the AMA.<sup>174</sup> However, none of these entities have pressed the matter or made it a priority.

As a matter of historical significance, Representative Al Gore raised the possibility of incentives when he introduced NOTA in July 1983.<sup>175</sup> It is also

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170. See *supra* note 12 and sources cited therein.

171. *Hearing Before the Subcomm. On Oversight & Investigations, supra* note 137, at 22–23, 84.

172. Interview of Thomas Peters, Member, AAKP Board of Directors (June 10, 2008).

173. *Hearing Before the Subcomm. On Oversight & Investigations, supra* note 137, at 84.

174. See Press Release, Am. Med. Ass'n, Financial Incentives Could Improve Organ Donation and Reduce Donor-Recipient Gap (June 16, 2008), available at <http://www.prnewswire.com/news-releases/financial-incentives-could-improve-organ-donation-and-reduce-donor-recipient-gap-57471977.html>.

175. *Hearing on H.R. 4080 Before the Subcomm. on Health & the Env't, supra* note 41, at 9–10

noteworthy that he added section 301 not because of a deeply held belief that incentives were wrong, but because of the unhappy coincidence of his committee's hearings on the bill with the sensational negative publicity attending the startup of an organ-brokerage firm in Virginia. But for that twist of fate, the middle ground between outright prohibition and unregulated markets would already have been sown with organ donor compensation programs, and tens of thousands of lives might have been saved in the last quarter century by an adequate supply of organs generated by appropriate financial incentives.

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(statement of Rep. Albert Gore, Jr.). A bill to authorize the HHS secretary to carry out demonstration projects to increase the supply of organs donated for human transplantation, H.R. 2856, 108th Cong. (2003), had the support of no Republicans and five Democrats. Cosponsors were representatives Donna M. Christensen (D-VI), Martin Frost (D-TX), Rush D. Holt, (D-NJ), Donald M. Payne, (D-NJ), and Vic Snyder (D-AR).